

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

Philip Geary

v.

Civil No. 06-cv-334-SM

Bruce Cattell, Warden,  
Northern New Hampshire  
Correctional Facility

**REPORT AND RECOMMENDATION**

Philip Geary has filed a petition for a writ of habeas corpus (document no. 1) pursuant to 28 U.S.C. § 2254. The matter is before me for preliminary review. See Rule 4 of the Rules Governing § 2254 proceedings (requiring initial review to determine whether the petition is facially valid). As discussed herein, I find that the petition is not facially valid as it does not demonstrate exhaustion of the claims raised in Geary's petition.

**Standard of Review**

Under this Court's local rules, when an incarcerated plaintiff commences an action pro se and in forma pauperis, the magistrate judge is directed to conduct a preliminary review. LR 4.3(d)(2). In conducting the preliminary review, the Court



construes pro se pleadings liberally. See Ayala Serrano v. Lebron Gonzales, 909 F.2d 8, 15 (1st Cir. 1990) (following Estelle v. Gamble, 429 U.S. 97, 106 (1976) to construe pro se pleadings liberally in favor of the pro se party). "The policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts, the court may intuit the correct cause of action, even if it was imperfectly pled." Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997), cert. denied, Ahmed v. Greenwood, 522 U.S. 1148 (1998).

At this preliminary stage of review, all factual assertions made by the plaintiff and inferences reasonably drawn therefrom must be accepted as true. See Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (stating the "failure to state a claim" standard of review and explaining that all "well-pleaded factual averments," not bald assertions, must be accepted as true). This review ensures that pro se pleadings are given fair and meaningful consideration. See Eveland v. Dir. of C.I.A., 843 F.2d 46, 49 (1st Cir. 1988).

#### Background

On February 5, 2004, Geary was convicted of multiple felonies after a jury trial in the Strafford County Superior



Court. Geary was sentenced to four separate 10 - 30 year prison terms and one 3 ½ - 7 year prison term. His 10 - 30 year sentences were imposed consecutively to one another such that Geary's total sentence is 40 - 120 years. Geary claims that after trial, he requested that his attorney appeal his conviction, but that his attorney never filed a notice of appeal. Geary attempted to file a pro se notice of appeal in April of 2004 which was ruled untimely by the New Hampshire Supreme Court. On October 1, 2005, Geary filed a motion for a new trial in the state Superior Court. Geary admits that his motion for a new trial, which he alleges contains the same claims as his petition before this Court,<sup>1</sup> is still pending in the state court.

#### Discussion

Under 28 U.S.C. § 2254, the federal courts are authorized to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." To be eligible for habeas relief, Geary must show that he is both in

---

<sup>1</sup>In his federal petition, Geary alleges five claims of prosecutorial misconduct, six claims of ineffective assistance of counsel, and one claim that his sentence is illegal. Geary has not provided this Court with any pleadings filed in state court.



custody and has exhausted all state court remedies or that he is excused from exhausting those remedies because of an absence of available or effective state corrective process. See 28 U.S.C. § 2254(a) & (b); see also Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 489-92 (1973); Benson v. Super. Ct. Dep't of Trial Ct. of Mass., 663 F.2d 355, 358-59 (1st Cir. 1981). Geary satisfies the first eligibility requirement as he is currently serving his sentence and is thus in custody. However, at this time, the petition neither demonstrates that Geary has fully exhausted his state remedies, nor that effective state remedies are unavailable to him.

A petitioner's remedies in New Hampshire are exhausted when the State's highest court has had an opportunity to rule on the petitioner's federal constitutional claims. See Lanigan v. Maloney, 853 F.2d 40, 42 (1st Cir. 1988), cert. denied, Maloney v. Lanigan, 488 U.S. 1007 (1989) ("habeas corpus petitioner must have presented the substance of his federal constitutional claim to the state appellate courts so that the state had the first chance to correct the claimed constitutional error"); see also Picard v. Connor, 404 U.S. 270, 275 (1971) (requiring petitioner to have fairly presented the federal nature of his claims to the



state courts to give them the first opportunity to remedy the claimed constitutional error). “[T]he exhaustion principle holds, in general, that a federal court will not entertain an application for habeas relief unless the petitioner first has fully exhausted his state remedies in respect to each and every claim contained within the application.” Adelson v. DiPaola, 131 F.3d 259, 261 (1st Cir. 1997) (emphasis added).

Geary concedes that the claims are not yet exhausted, but are all pending in the state trial court. It is not clear whether or not Geary presented any of these claims to the New Hampshire Supreme Court in his April 2004 attempt to proceed with a pro se state court appeal.

Additionally, Geary has not alleged facts sufficient to show that the state corrective process was inadequate. Geary’s efforts at appeal were denied as untimely, and his counsel failed to file a notice of appeal, but nothing in the petition suggests that state processes generally provided for seeking relief were not available to Geary. Further, Geary is currently litigating these issues by utilizing the state’s post-conviction corrective processes. Accordingly, I find that Geary has not alleged facts



sufficient to demonstrate that he should be excepted from the rule requiring exhaustion.

Because Geary concedes that he has not yet exhausted his state court remedies, I recommend that this action be dismissed without prejudice to refileing once the claims have been exhausted in state court. This recommendation is in no way a comment on whether or not the claims raised in the petition are substantively meritorious or timely filed. If a new petition is filed after the claims are fully exhausted, preliminary review pursuant to § 2254 Rule 4 will be conducted.

Conclusion

Any objections to this Report and Recommendation must be filed within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. See Unauthorized Practice of Law Comm. v. Gordon, 979 F.2d 11, 13-14 (1st Cir. 1992); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).

  
James R. Muirhead  
United States Magistrate Judge

Date: September 18, 2006

cc: Philip Geary, *pro se*